IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2303 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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AMIT M PATHAKJI SR.MANAGER (MECH.) & 1 - Petitioner(s)
Versus
BHAVNABEN AMITKUMAR PATHAKJI - Respondent(s)

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Appearance :
MR KUNAN B NAIK for Petitioner(s) : 1 - 2.
MR MTM HAKIM for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 12/06/2007

ORAL JUDGMENT

1. The petitioners – original plaintiffs have filed this petition under Article-227 of the Constitution of India challenging the order passed by the learned Civil Judge (S.D.) Vadodara below an application Ex.154 in Regular Civil Suit No.774 of 1987 on 3.1.2005, on the ground that the said order is absolutely illegal, unjust, improper, irrational, invalid and unreasonable. It is also challenged on the ground that the said order is passed with total non-application of mind and on misconception of facts and law. It is further challenged on the ground that it is passed in violation of and in utter disregard of the statutory provisions of the Code of Civil Procedure and against the judicial pronouncements.

2. Notice was issued by this Court on 22.2.2005 and ad-interim relief in terms of para-8(E) of the petition was granted and further proceedings of the Regular Civil Suit No.774 of 1987 were stayed. The Court has also permitted the petitioner to delete the name of petitioner No.2 as he has expired. The Court further observed that when the witness attempted to submit the case other than specifically pleaded in the written statement and the cross-suit, the petitioner was compelled to produce and show one document dated 23.11.1987, addressed by the witness – Bhavnaben. The Court has also asked the petitioner to produce copy of the written statement as well as copy of the plaint of the cross-suit before the Court. The Court thereafter issued rule on 29.3.2005 and ad-interim relief granted earlier was allowed to continue.

3. It is the case of the petitioner that the petitioner No.2 purchased the property in question from his income and hence the said property became his self-acquired property. In the year 1987, the petitioner No.2 found it difficult to maintain the property in question and hence for its renovation the respondent went to Vadodara to look after the renovation work of the property in question. The respondent desired to give property in question on rent to some third party. However, the petitioners did not want to give this property on rent to any third party. The petitioner No.2 therefore gave a public notice in the year 1987 through an advertisement in the local newspaper making it clear that the owner of the property did not want to give it on rent and hence no one should enter into any negotiation with the respondent for that purpose. The petitioners apprehended that the respondent might transfer the property in their absence and

hence the petitioners instituted a suit before the Civil Court (J.D.) which ultimately came to be transferred to the Civil Court (S.D.) and came to be registered as Regular Civil Suit No.774 of 1987.

4. During the pendency of the said suit the respondent wrote a letter to the petitioner No.2 stating that she had performed all the formalities to withdraw the suit filed by her for getting injunction against any action by the petitioners to remove her from the property in question. The said suit was registered as Civil Suit No.705 of 1987. Thereafter, the said suit was withdrawn unconditionally. The respondent in the said letter had not stated anything with respect to any consensus about withdrawal of the suit filed by the petitioners on withdrawal of suit filed by her. The respondent came out with the defense that there was mutual consensus between the parties that the

parties would withdraw both the suits, for this purpose it became necessary to produce the letter dated 23.11.1987.

5. During the course of cross-examination of the respondent on 24.9.2004, a letter dated 23.11.1987 was sought to be produced for the cross-examination of the respondent vide an application Ex.154. The application Ex.154 came to be rejected by the learned trial Judge on the ground that the same was belatedly filed and that the said document is not relevant to the issue involved in the suit and that the provisions for production of the documents for cross-examination of witness under Order-13 Rule-2 of the Civil Procedure Code are repealed by virtue of an amendment in the Civil Procedure Code.

6. It is this order which is under challenge in the present petition.

7. Mr.K.B.Naik, learned advocate appearing for the petitioners submit that the impugned order is passed by the learned trial Judge in utter disregard of the provisions contained in the Civil Procedure Code inasmuch as while passing the impugned order, the learned trial Judge has observed that the Order-13 Rule-2 of the Civil Procedure Code is repealed or deleted from the Code. As a matter of fact, the learned trial Judge has not tried to examine the provisions of the Code where Order-13 Rule-2 Sub-rule-2 Clause (a) still exists very much on the statute book now in form of sub-rule-3 of Rule-1 of Order-13. The learned trial Judge has not looked at the provisions contained in the Code by Section-23 of the Act 46 of 1999. The original Order-13 was amended and the provisions of Rule-2 are now merged in Rule-1. He has, therefore, submitted that the learned trial Judge has clearly committed an error in passing the impugned order and hence it is

required to be quashed and set aside. He has further submitted that the provisions of Order-13 Rule-1 sub-rule-3 are special provisions, which provides that if any document is produced for cross-examination, the provisions of Order-13 Rule-1, sub-rule-(i) and (ii) and other provisions would not apply.

8. In support of his submission Mr.Naik has relied on the decisions of (1) **M/s.Rajasthan Spinning and Weaving Mills Ltd., Bhilwara V/s. Rajasthan Textile Industries, Madanganj, reported in AIR 1987 Rajasthan 60** (2) **Miss T.M.Mohana Vs. V. Kannan, reported in AIR 1984 Madras 14** (3) **Ranjit Kanungo Vs. Ibcon Pvt. Ltd., Bombay, reported in AIR 1982 Karnataka 219** (4) **Balwant Kumar and another Vs. Kailash Behl and another, reported in AIR 2003 Himachal Pradesh 48.**

9. Mr.Naik has further submitted that the

impugned order is a result of illegal and materially irregular and non-exercise of jurisdiction vested with the trial Court and hence the impugned order deserves to be quashed and set aside. He has further submitted that the learned trial Judge has erred in observing that no sufficient cause is shown for late production of the said letter whereas it was specific case of the petitioner that the document was produced for cross-examination of the witness and hence sufficient cause was shown. The cause for late production of the document was to cross-examine the witness and hence no cause was required to be shown. It is further submitted that the learned trial Judge has failed to appreciate that the said letter was important for cross-examination of the witness and hence he should not have observed that the said letter is not necessary for adjudication. He has, therefore, submitted that the learned trial Judge without applying

his mind to the facts and circumstances of the case and without appreciating the legal position passed the impugned order on erroneous consideration and hence the order being not sustainable deserves to be quashed and set aside.

10. Mr.M.T.M. Hakim, learned advocate appearing for the respondent on the other hand has supported the order of the learned trial Judge and submitted that it is an interlocutory order, which cannot be interfered with by this Court while exercising its writ jurisdiction under Article-227 of the Constitution of India. He has further submitted that the respondent filed Regular Civil Suit No.704 of 1987 against the petitioner No.2. The petitioner No.1 filed Regular Civil Suit No.774 of 1987 against the respondent. Thereafter, compromise was arrived at between the parties and it was understood between the parties

that both the suits were to be withdrawn. The respondent withdrew the Suit No.705 of 1987. While the petitioner though promised to withdraw the suit did not withdraw the said suit and kept the respondent in dark and left her under the false impression that the present suit had already been withdrawn. After gaining confidence the petitioner began to reside with her in the property in question. The deceased petitioner No.2 had frequently visited and stayed in the aforesaid property as a family member and the respondent as an obedient daughter-in-law has always welcomed the deceased petitioner No.2. Inspite of this in 1995 the petitioner No.1 filed Suit of divorce being H.M.P. No.61 of 1995 and thereafter left the property in question at his own free will on obtaining legal advise as on 1995. He has submitted that all these facts have not been disclosed by the petitioner. He has further submitted that the letter sought to be produced vide an

application Ex.154 was alleged to have been in possession of the petitioner since 1987 and yet the same was not produced alongwith the filing of the suit and hence it was rightly rejected by the learned trial Judge. He has further submitted that the said letter has no connection whatsoever with the issue involved in the suit. He has further submitted that the Order-13 Rule-1 sub-rule-3 can be pressed into service only to contradict the witness of the party and not the contesting party itself and hence the interpretation put forward by the learned trial Judge is legal and in consonance with the spirit of Order-13 of the Civil Procedure Code. Lastly he has submitted that the learned trial Judge is vested with the jurisdiction to pass the impugned order while considering the production of document. It is not necessary for him to appreciate importance of the document but he has simply considered the relevancy of the document

within the periphery of the Civil Procedure Code. He has, therefore, submitted that no interference of this Hon'ble Court is required while exercising writ jurisdiction under Article-227 of the Constitution of India.

11. After having heard the learned advocates appearing for the respective parties and after having gone through the pleadings as contained in the memo of petition as well as affidavit-in-reply and after going through the impugned order passed by the learned trial Judge and after perusing the statutory provisions as well as decided case law on the subject, the Court is of the view that the learned trial Judge has misread the statutory provisions and has not properly applied the ratio of the decisions cited before him. Looking to the facts of the present case it is an admitted position that the suit is filed in the year 1987. Alongwith the list

of documents filed with the plaint of the suit the letter dated 23.11.1987 was not produced. According to the petitioner, there was no occasion to produce this letter. The respondent has filed written statement. In the written statement no averment was made with regard to the withdrawal of the suit. The respondent filed written statement in the suit, which according to her was agreed to be withdrawn in the year 1987. Despite this fact no whisper is made in the written statement. It is for the first time in her examination in chief she has stated that the compromise was made between the parties and both the suits were agreed to be withdrawn. As per the compromise she has withdrawn the suit being Regular Civil Suit No.705 of 1987, on 25.11.1987. For the purpose of withdrawal of the present suit, signature of the petitioner / plaintiff No.1 was required and as soon as he would come from Surat the same would be withdrawn. To controvert this

averment, which the respondent has made in her examination in chief the petitioner has sought permission of the Court to show a letter which is in his possession, which was objected to and hence application Ex.154 was preferred by the petitioner seeking leave of the Court to produce the said letter. As far as rejection of the said application is concerned, the learned trial Judge has stated that this application is belated one. It is true that the letter is of 1987 and it was sought to be produced in 2004. However, the occasion arose for the first time in 2004 when the averment was made by the respondent about withdrawal of the suit and to controvert this submission letter was sought to be produced. In this view of the matter, it cannot be said that the letter is belated one.

12. The second reason given by the learned trial Judge is that the letter is not

relevant to the issue involved in the suit. As a matter of fact, the respondent has raised the issue in her examination in chief that the suit was agreed to be withdrawn and when there was no such agreement which can be proved on the basis of the letter, it is difficult to accept the reasoning of the learned trial Judge that the said letter is not relevant to the issue involved in the suit.

13. The third reason given by the learned trial Judge is that the Order-13 Rule-2 was deleted from the statute book and hence the said provision cannot be relied on for the purpose of production of the document. This is also not tenable in view of the relevant statutory provisions as well as decided case law.

14. Order-13 deals with production, impounding and return of documents. Rule-1 deals with original documents to be produced at or

before the settlement of issues. It states that the parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement. Rule-3 carvs out an exception which says that nothing in sub-rule (1) shall apply to documents (a) produced for the cross-examination of the witnesses of the other party; or (b) handed over to a witness merely to refresh his memory. Order-13 applies to the plaintiff as well as defendant for the purpose of production of documents. Similarly, Order-7 Rule-14 deals with production of document on which plaintiff sues or relies. Sub-rule-1 of Rule-14 says that where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by

him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint. Sub-rule-4 however carvs out an exception and says that nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witness, or, handed over to a witness merely to refresh his memory. Similarly, Order-8 deals with written statement, set-off and counter claim. Rule-1A of Order-8 deals with duty of defendant to produce documents upon which relief is claimed or relied upon by him. Sub-rule-1 of Rule-1A of Order-8 says that where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the

written statement. Sub-rule-4 of Rule-1A of Order-8 carvs out an exception and says that nothing in this rule shall apply to documents- (a) produced for the cross-examination of the plaintiff's witnesses, or (b) handed over to a witness merely to refresh his memory.

15. If the above statutory provisions are taken into consideration it becomes clear that if any document is sought to be relied upon or produced for the purpose of cross-examination of witnesses the exception carved out would come to the rescue of the party and the production cannot be denied merely on the ground that the same was not produced either at the time of filing suit or at the time of filing the written statement, as the case may be.

16. These provisions have come up for consideration before the Court on several

occasions. In the case of **M/s.Rajasthan Spinning and Weaving Mills Ltd., Bhilwara (Supra),** the Rajasthan High Court has held that where the plaintiff was allowed to file the replication or re-joinder, in respect of amendments sought by the defendant, to meet the defendant's case that no notice prior to the selling of the goods was served on him by the plaintiff, the order not granting permission to the plaintiff to file the copy of the said notice alongwith the re-joinder would be liable to be set aside because in such circumstances, proper rule applicable would be Rule-18(2) of Order-7 and not Order-7 Rule-14 or Order-13, Rule-1 or Order-13 Rule-2.

17. In the case of **Miss T.M.Mohana Vs. V. Kannan (Supra),** the Madras High Court has taken the view that it is seen from the provisions of Order-8 Rule-1 (2) and (6) O.8 Rule 8-A (1) and (3) and Order-13 Rule 2(2)

that at every stage at which the defendant is called upon to produce the documents, an exception is always made with reference to documents produced for the cross-examination of the plaintiff's witnesses or the cross-examination of the witnesses of the other party or in answer to a case set up by the plaintiff subsequent to the filing of the suit or with a view to refresh memory. In other words, the obligation to produce the documents relied upon by the defendant at the stages contemplated under Order-8 Rule 1(2), Order 8 Rule 8-A(1) and by both parties under Order 13, Rule 1, C.P.C. has been done away with in all those cases with reference to documents produced for cross-examination. An answer to the contention raised by Mr.Hakim is found from and negatived by Madras High Court and it is held that the benefit of the production of a document for the purpose of cross-examination can be availed of by the defendant with reference to all witnesses of

the plaintiff including the plaintiff. The expression 'plaintiff's witnesses' in Order-8 Rule 1 (6) and Order 8 Rule 8-A (3) would take in not only the witnesses on behalf of the plaintiff, but also the plaintiff himself when he is examined as a witness in support of his case. Avowedly, the provisions of Order-8 R. 1(6) and Order 8, Rule 8-A(3) are applicable to defendants as they contemplate the cross-examination of the witnesses of the plaintiff by the defendant and documents being put to them without any distinction being made regarding such witnesses as party witnesses and other witnesses. Those provisions are, therefore, intended to make available the benefit of the exception to the defendant generally with reference to all witnesses of the plaintiff including the plaintiff. The Madras High Court has further taken view that Order-7 Rule 18(2) C.P.C. gives the benefit of such an exception to the plaintiff while the defendant's witnesses are

being cross-examined. Order 8, Rule 1(6) and Order 8, Rule 8-A (3) extends such benefits to the defendants when the plaintiff's witnesses are cross-examined. On the other hand, Order 13, Rule 2, being a general provision applicable to both the plaintiff as well as the defendant, makes available to both the benefit of the production of such documents during the course of the cross-examination of the other party. Thus, the benefit of the production of a document for purposes of cross-examination can be availed of either by the plaintiff or by the defendant with reference to the witnesses of the other party. Having regard to the use of the expression 'defendant's witnesses' in Order 7, Rule 18 (2), and the expression 'plaintiff's witness' in Order 8, Rule 1(6) and Order 8 R. 8-A (3) and the expression 'witnesses of the other party' in O.13, R.2 (2) (a) C.P.C. it is difficult to confine the benefit conferred under Order 8, Rule 1 (6)

and O.8, Rule 8-A (3)(a) C.P.C. only to cases of witnesses other than the party. This gives complete answer to the issue raised by the respondent in the present petition. The Court is in complete agreement with the reasonings adopted by the Madras High Court. The view taken by the learned trial Judge is contrary to the view expressed by the Madras High Court and it is also contrary to the statutory provisions. The petitioner's application cannot be thrown on the ground that Order-13 Rule-2 has been deleted from the statute.

18. In the case of **Ranjit Kanungo Vs. Ibcon Pvt. Ltd., (Supra),** the Karnataka High Court has taken the similar view and held that from the provisions of Order-13 Rule-2 it is clear that the cause for the non-production of the documentary evidence which is required to be shown as per sub-rule (i) of R.2 of O.XIII of the Code, is not required to be shown in

respect of the production of documents intended to be used in the cross-examination of the witness or handed over to a witness merely to refresh his memory. Such documents which are intended to be used during the course of the cross-examination for the purpose of testing the veracity of a witness need not be produced at the stage of production. Of course, such documents must also satisfy the rule of relevancy and admissibility.

19. In the case of **Balwant Kumar and another Vs. Kailash Behl and another (Supra),** the Himachal Pradesh High Court by allowing the Revision Application has observed that the trial Court is also not right in observing that since it was not given in the list of witnesses and relied upon at the time of filing the plaint as envisaged under Order 7, Rule 14 CPC, it cannot be permitted to be produced at a later stage for the same reason

that the plaintiffs intend to produce it to rebut the stand of adverse possession taken by the defendants and it is permissible as provided under sub-rule (2) of Rule 18 of Order 7 C.P.C.

20. The Court is fully conscious about the fact that the discretionary order passed by the trial Court should not be lightly interfered with, but when the order is perverse or contrary to the provisions of law, interference becomes inevitable for ends of justice. The impugned order is of such nature and hence it is required to be interfered with even while exercising writ jurisdiction under Article-227 of the Constitution of India.

21. In the above view of the matter, the impugned order is contrary to the provisions contained in the Civil Procedure Code as well as not in consonance with the settled legal

position and hence it deserves to be quashed and set aside. The petition is accordingly allowed. Rule is made absolute without any order as to costs.

22. Since the suit is of 1987 the learned trial Judge is directed to proceed with the suit and complete recording of the evidence, if any, and hearing of the arguments and dispose of the same as expeditiously as possible, preferably within the period of six months from the date of receipt of writ of order of this Court or from the date of receipt of certified copy, which ever is earlier.

(K. A. PUJ, J.)

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